

ARTICLES

MUCH RESPECT: TOWARD A HIP-HOP THEORY OF PUNISHMENT

Paul Butler*

INTRODUCTION: THE HIP-HOP NATION.....	984
I. POPULAR CULTURE AND CRIMINAL LAW	987
II. HIP-HOP 101	989
A. <i>Hip-Hop's Influence: Consumers</i>	992
B. <i>The Academy</i>	993
C. <i>Hip-Hop as a Political Movement</i>	994
D. <i>The Limits of Hip-Hop's Influence</i>	995
III. HIP-HOP AND SOCIAL NORMS.....	996
IV. PUNISHMENT: THE REMIX	999
A. <i>Why Punish?</i>	1001
1. <i>Retribution and respect in hip-hop</i>	1002
2. <i>Hip-hop utility: Third party interests and the effects of mass incarceration.</i>	1005
B. <i>What to Punish?</i>	1007
1. <i>Who's bad?</i>	1007
2. <i>Hip-hop and drugs: Keeping it real</i>	1009
C. <i>How to Punish?</i>	1011
1. <i>Punishment from inside</i>	1011
2. <i>Prison</i>	1013
CONCLUSION: WORD IS BORN	1015

* Professor of Law, The George Washington University Law School. This Article was presented as a work-in-progress at Washington University School of Law and at a *Stanford Law Review* Symposium. I thank the participants in those events. Special shout out to Daniel Solove. Mad props to Christopher Bracey, Kimberly Jade Norwood, and Dorothy Roberts. Big up to my research assistants Jeremy Medovoy, Michael Robinett, and Eduardo Rodriguez.

If I ruled the world, imagine that . . .
I'd open every cell in Attica, send 'em to Africa. . . .
If I ruled the world, imagine that
I'd free all my sons, I'd love 'em love 'em baby
—Nas¹

INTRODUCTION: THE HIP-HOP NATION²

This Article imagines the institution of punishment in the hip-hop nation. My thesis is that hip-hop can be used to inform a theory of punishment that is coherent, that enhances public safety, and that treats lawbreakers with respect. Hip-hop can improve the ideology and administration of justice in the United States.

For some time the debate about why people should be punished has been old school: Each one of four theories of punishment—retribution, deterrence, incapacitation, and rehabilitation—has ascended to prominence, and then lost its luster. Hip-hop offers a fresh approach. It first seems to embrace retribution. The “unwritten law in rap,” according to Jay-Z, is that “if you shoot my dog, I’mma kill yo’ cat . . . know dat/ For every action there’s a reaction.”³

Next, however, comes the remix. Hip-hop takes punishment personally. Many people in the hip-hop nation have been locked up or have loved ones who have been. Punishment is an exercise of the state’s police power, but it also implicates intimate family relationships. “Shout outs” to inmates—expressions of love and respect to them—are commonplace in the music and visual art. You understand criminal justice differently when the people that you love experience being “locked down all day, underground, neva seein’ the sun/Vision stripped from you, neva seein’ your son.”⁴

The hip-hop theory of punishment acknowledges that when too many people are absent from their communities because they are being condemned by the government, prison may have unintended consequences. Retribution must be the object of punishment, but it should be limited by important social interests. In a remarkable moment in American history, popular music is

1. Nas, *If I Ruled the World, on IT WAS WRITTEN* (Sony Records 1996) (lyrics available at Original Hip-Hop (Rap) Lyrics Archive, at <http://www.ohhla.com/anonymous/nas/written/ruled.nas.txt> (last visited Mar. 28, 2004)).

2. The hip-hop nation consists of artists, students, workers, activists, and scholars. For a discussion of the distinction between the hip-hop generation and Generation X, see Gary Mendez, *Confessions of a Gen Xpatriate: Pledging Allegiance to the Hip-Hop Generation*, at <http://www.horizonmag.com/3/gen-xpatriate.asp> (last visited Mar. 28, 2004).

3. Jay-Z, *Justify My Thug*, on THE BLACK ALBUM (Roc-A-Fella Records 2003) (lyrics available at Original Hip-Hop (Rap) Lyrics Archive, at <http://www.ohhla.com/anonymous/jigga/theblack/justify.jyz.txt> (last visited Mar. 4, 2004)).

4. Beanie Sigel, *What Your Life Like*, on THE TRUTH (Def Jam Records 2000) (lyrics available at Original Hip-Hop (Rap) Lyrics Archive, at <http://www.ohhla.com/anonymous/beanie/thetruth/whatlife.sig.txt> (last visited Mar. 7, 2004)).

weighing the costs and benefits of punishment. As we listen to the radio, watch music videos, dance at clubs, or wear the latest fashion, we receive a message from the “black CNN.”⁵ Hip-hop exposes the current punishment regime as profoundly unfair. It demonstrates this view by, if not glorifying law breakers, at least not viewing all criminals with the disgust which the law seeks to attach to them. Hip-hop points out the incoherence of the law’s construct of crime, and it attacks the legitimacy of the system. Its message has the potential to transform justice in the United States.

Hip-hop already has had a significant social impact. It is the second best-selling genre of music in the United States.⁶ The culture transcends rap music: It includes television, movies, fashion, theater, dance, and visual art. Hip-hop is also big business: Estimates of its contribution to the U.S. economy range to the billions.⁷ Increasingly, hip-hop is also a political movement.

Hip-hop foreshadows the future of the United States—one in which no racial group will constitute a majority.⁸ It is the most diverse form of American popular culture. The most commercially successful hip-hop artists in the United States are black, though there are popular white and Latino acts as well.⁹ The

5. The phrase comes from Chuck D, of the rap group Public Enemy. See *The History of Hip-Hop*, at <http://www.headbob.com/hiphop/hiphophistory.shtml> (last visited Mar. 28, 2004).

6. See Matt Benz, *Rock Still the Top-Selling Genre*, BILLBOARD, Mar. 31, 2001, at 6, 86 (explaining that hip-hop overtook country music as the second most popular genre of music); Todd Martens, *Rock Tops RIAA Poll*, BILLBOARD, May 31, 2003, at 74 (reporting that the market share of rap/hip-hop grew from 11.4% to 13.8%, second only to rock). In 2003, for the first time, the top ten songs on the Billboard Hot 100 were all by African American artists. Gail Mitchell, *Black-Music's Historic Week: Hot 100 Testifies to Mainstreaming of R&B/Hip-Hop*, BILLBOARD, Oct. 18, 2003, at 20.

7. See Alan Hughes, *Hip-Hop Economy*, BLACK ENTERPRISE, May 2002, available at <http://www.blackenterprise.com/Pageopen.asp?Source-Articles/01012002ah.html> (last visited Mar. 28, 2004) (describing the money generated by various hip-hop businesses).

8. See U.S. CENSUS BUREAU, PROJECTIONS OF THE RESIDENT POPULATION BY RACE, HISPANIC ORIGIN AND NATIVITY: MIDDLE SERIES, 2050 TO 2070, available at <http://www.census.gov/population/projections/nation/np-t5-g.text> (last visited Mar. 28, 2004) (reporting that in 2050 almost 50% of Americans will be either African American, Hispanic, Asian American, or Native American).

9. See Lynette Holloway, *The Angry Appeal of Eminem Is Cutting Across Racial Lines*, N.Y. TIMES, Oct. 28, 2002, at C1 (noting how “[t]hree decades [after the creation of hip-hop], the No. 1 selling rapper in the country is a 30-year-old white man, Eminem”); Brad Tyler, *Houston: A Hot Spot for Hip-Hop; The Scene on Rap's Third Coast Benefits from Local and Latino Support*, BILLBOARD, Sept. 23, 2000, at 32 (describing the influence of Latino Rap in Houston). Asian hip-hop artists have also made inroads. Chinese-American rapper Jin won BET’s recent rap contest. His debut album is highly anticipated. See Raymond Fiore, *Jin’s Bad Rap: Is This Asian-American MC’s Debut Making History or Rehashing Old Stereotypes?*, ENT. WKLY., Feb. 13, 2004, at L2T3. Best-selling singer Sean Paul, known for blending Jamaican dancehall music with hip-hop, is half Chinese. Shelah Moody, *Jamaica Meets Hip-Hop: Dance Hall Fuses Styles and Finds an Audience*, S.F. CHRON., Mar. 23, 2003, at 27 (explaining that “Sean Paul has a unique, racially ambiguous look (he is black, Portuguese and Chinese) that various ethnic groups can identify with”).

consumers are mainly non-black.¹⁰ The producers are Asian, black, Latino, and white—and combinations of all of those. The Neptunes, among hip-hop's most acclaimed producers, consist of Chad Hugo, a Filipino American, and Pharrell Williams, an African-Korean American.

Indeed, the borders of the hip-hop nation are not concurrent with the borders of any nation-state. The culture is international, with particularly strong variants in Africa, Brazil, the Caribbean, Western Europe, Southeast Asia, and Japan.¹¹

At the same time that an art form created by African American and Latino men dominates popular culture, African American and Latino men dominate American prisons.¹² Unsurprisingly then, justice—especially criminal justice—has been a preoccupation of the hip-hop nation. The culture contains a strong descriptive and normative analysis of punishment by the people who know it best.

Bold, rebellious, often profane, the music has multicultural detractors as well as fans. One need not like hip-hop, however, to appreciate its potential to transform. Imagine, for example, that television situation comedies consistently critiqued the government's foreign policy, that country music ridiculed the nation's health care, or that fans at professional sports events were warned that the government was exploiting them. We would anticipate a strong response from the state if powerful critiques of it were widely disseminated. These scenarios are hard to imagine because most of American popular culture is explicitly apolitical. Moreover, there probably would be widespread disagreement among the producers and consumers of the culture about what politics to advocate.

Hip-hop culture is different. Often it is explicitly political. Its politics are not always easy to determine, and on some issues there is great diversity of opinion. On the fairness and utility of American criminal justice, however, the hip-hop nation speaks as one. In the contemporary history of the United States, it is hard to recall another dominant form of popular culture that contains such a strong critique of the state.

Many seem to be listening. The hip-hop nation is gaining political power, and seems more inclined to use it than has historically been the case with youth

10. See Holloway, *supra* note 9 (noting that "it is well known among music industry executives that hip-hop consumers are more than 75 percent nonblack").

11. *The New York Times* notes that "America's most powerful cultural export right now is hip-hop. It's the language of the young around the world. In Rome, your French-born cabdriver (who barely speaks English) may be singing along to an OutKast track." Elvis Mitchell, *No Green Light on Road from 'Hood to Hollywood*, N.Y. TIMES, Feb. 26, 2004, at C1.

12. See MARC MAUER, RACE TO INCARCERATE 125 (1999) (reporting that the lifetime likelihood of imprisonment for a male born in 1991 would be 29% if he were African American, 16% if he were Latino, and only 4% if he were white) (citing THOMAS P. BONCZAR & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: LIFETIME LIKELIHOOD OF GOING TO STATE OR FEDERAL PRISON (1997)).

or artists. I do not suggest, however, that the hip-hop nation will be a potent voting bloc in the near future.¹³ My claim is normative. Hip-hop culture makes a strong case for a transformation of American criminal justice: It describes, with eloquence, the problems with the current regimes, and articulates, with passion, a better way. Its message is one that we should heed for reasons both moral and utilitarian.¹⁴

This Article proceeds as follows. In the next Part, I discuss the relationship between popular culture and criminal law. Part II provides a short history of hip-hop culture, with special attention to the rule-breaking that attended the culture's birth. Part III describes hip-hop's relevance to the the current debate in criminal law scholarship about social norms. Part IV sets forth several elements of a hip-hop theory of criminal law. The Article concludes by comparing hip-hop justice with constructs of justice found in civil rights and critical theory.

I. POPULAR CULTURE AND CRIMINAL LAW

There is a symbiotic relationship between culture and law. Culture shapes the law, and law is a product of culture. Television, for example, has profoundly informed our perceptions of criminal justice in the United States. Most Americans can recite the Miranda warnings, not because they have been arrested, but because television cops advise television "bad guys" of their constitutional rights several times a day.

Television news programs are dominated by stories about crime.¹⁵ The message conveyed is that "street" crime is a major threat to our well-being.¹⁶ The main perpetrators, the news programs suggest, are African American and Latino men. Politicians respond to the purported crisis by getting tough on crime, which includes building more prisons, instituting more severe sentences, imposing harsh punishments upon recidivists, eliminating the discretion of

13. See FED. ELECTION COMM'N, VOTER REGISTRATION AND TURNOUT BY AGE, GENDER AND RACE 1998 (1998), available at <http://www.fec.gov/pages/98demog.htm> (last visited Mar. 5, 2004) (reporting that those between the ages of 18-24 made up only 5.1% of the total vote in the 1998 general elections).

14. Other legal scholars have explored relationships between music and law. See Christopher A. Bracy, *Adjudication, Antisubordination, and the Jazz Connection*, 54 ALA. L. REV. 853 (2003) (analogizing between judicial adjudication in civil rights cases and free jazz); John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL L. REV. 2129 (1992) (discussing the similarity between the artistry of Archie Shepp and critical race theory's intellectual approach and potential).

15. See MAUER, *supra* note 12, at 172-74 (describing studies of crime coverage on network and local news programs).

16. For a dramatic depiction of the ability of television news to generate unreasonable fear about crime, see BOWLING FOR COLUMBINE (MGM 2002).

judges to reduce punishment, and federalizing many crimes.¹⁷ One effect of these laws is the disproportionate incarceration of African Americans and, to a lesser extent, Latinos.

Some scholars and activists have suggested that the effect of the cultural depiction of crime is that many Americans have exaggerated concerns about being victimized by black and Latino men.¹⁸ Some lawmakers seem to exploit these concerns for political reasons.¹⁹ One result is that some punishment seems driven by racial stereotypes.²⁰

The most frequently cited contemporary example is harsher federal penalties for crack cocaine than powder cocaine.²¹ Crack cocaine is powder cocaine that is cooked with baking soda until it forms small solid pieces. Crack is smoked rather than inhaled. It is less expensive than powder cocaine and has a briefer intoxicating effect.

A star basketball player, Len Bias, died as a result of a cocaine overdose in 1986.²² He was presumed to have ingested crack, although there was actually no evidence as to what form of cocaine he had consumed. Bias was African American, and crack cocaine was thought to be the preferred form in the black community.²³ Bias' death focused the media's attention on crack cocaine. Congress responded with one of the most severe punishment schemes for a drug in American history.²⁴ It instituted a mandatory sentence for possession of crack cocaine, but not powder cocaine. The punishment for sellers was especially harsh. To receive the same sentence as a crack distributor, a powder distributor must possess one hundred times the quantity of cocaine.²⁵ For example, the distributor of five grams of crack, which is enough for 25 doses and has a street value of approximately \$500, receives the same sentence as the distributor of 500 grams of powder, which is enough for 3000 doses and is worth \$40,000.

There is little scientific support for the proposition that crack cocaine

17. See Robert M. Bohm, *Crime, Criminals and Crime Control Policy Myths*, in JUSTICE, CRIME AND ETHICS 327, 343 (Michael C. Braswell, Belinda Rogers McCarthy & Bernard J. McCarthy eds., 1998) (explaining how "common conceptions of crime, criminals and crime control policy are to a rather large degree informed by myths").

18. See MAUER, *supra* note 12, at 50-55.

19. *Id.* at 56-78.

20. See generally Bohm, *supra* note 17 (discussing the ways in which myths inform crime control policies).

21. For an analysis of the legislative history of the federal crack sentencing laws, see David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1290-98 (1995).

22. *Id.* at 1295 & n.59.

23. *Id.* at 1293 (explaining that "[w]hites strongly associated crack with . . . inner city blacks").

24. 132 CONG. REC. 22,660 (1986) (statement of Rep. Robert H. Michel) (explaining how the "death of basketball star Len Bias shocked us into action").

25. Sklansky, *supra* note 21, at 1296.

merits more punishment than powder on a harm principle, and virtually no support for the hundred-to-one federal differential. The U.S. Sentencing Commission has proposed that the distinction be reduced. Likewise, President Clinton's drug czar recommended no disparity in punishment²⁶, and, during the presidential campaign of 2000, George W. Bush also rejected a distinction.²⁷ Thus far, however, Congress has refused to budge, in part because of the strong cultural bias against crack cocaine. Whether warranted or not, crack has a poorer reputation than powder. Culture, not logic or science, is the best explanation for why and how crack users are punished.

This point is not new or particularly surprising. In a democracy we would expect culture to inform law. The potential of hip-hop culture, however, to influence law seems less obvious—perhaps because hip-hop is a product of youth culture and perhaps because it seems to celebrate defiant and even outlaw conduct.²⁸ I hope to demonstrate that the culture, while rebellious, can be used to inform a principled, rules-based theory of punishment.

Austin Sarat has described punishment as “liv[ing] in culture through its pedagogical effects. It teaches us how to think about categories like intention, responsibility, and injury, and it models the socially appropriate ways of responding to injuries done to us.”²⁹ Hip-hop offers a fresh way of analyzing persistent unresolved problems in criminal law theory, including how to determine cause, the relationship between responsibility and blame, and the appropriate response of the state to law-breaking. Considering the growing influence of hip-hop culture, and the personal experience of many citizens of the hip-hop nation with criminal justice, its perspective deserves examination.

II. HIP-HOP 101

Hip-hop was begat in one of the poorest and most crime-ridden jurisdictions in the United States: the South Bronx, New York, during the 1970s. It was a place of a desperate, hard-knock creativity, as evidenced by the way its citizens talked, dressed, and danced. Even the teenagers who drew graffiti on the subway thought of themselves as artists, though the police had a different point of view.

A man who spun records for parties—DJ Kool Herc, he called himself—experimented with using two turntables to play copies of the same record.³⁰

26. See Peter Baker, *Clinton Would Cut Disparity in Some Cocaine Sentences*, WASH. POST, July 23, 1997, at A21.

27. See *Inside Politics* (CNN cable broadcast, Jan. 18, 2001) (transcript available at <http://www.cnn.com/TRANSCRIPTS/0101/18/ip.01.html> (last visited Mar. 28, 2003)).

28. Ironically, hip-hop culture is credited for influencing social mores other than law. It is said, for example, to encourage marijuana use and to promote gender stereotypes.

29. AUSTIN SARAT, WHEN THE STATE KILLS: CAPITAL PUNISHMENT AND THE AMERICAN CONDITION 23 (2001).

30. This account is taken from The History of Hip-Hop, *supra* note 5.

Herc used the turntables like a musical instrument—he made his own songs from other people’s recordings. Sometimes Herc would speak rhythmically to his beats (a technique borrowed from his Jamaican heritage).³¹ He taped these “raps” for boomboxes, and the music became popular all over New York City.³²

Herc’s work inspired other DJs, including Afrika Bambaataa, a Black Muslim also of Jamaican descent.³³ Bambaataa expanded Herc’s musical tracks from disco and house music to virtually any recorded sound, including rock music and television shows.³⁴ DJs “battled” (engaged in artistic competition) at city parks, and dancers performed in an athletic, bone-popping style called “break-dancing.”³⁵

For the purposes of my thesis, I want to note four things about the creation of hip-hop. First, many artists took an instrumentalist view of the law. The trespass law did not deter the graffiti artists, the copyright law did not stop the DJs from sampling any music they wanted, and the property law did not prevent DJs from “borrowing” electricity from street lamps at public parks. Second, the culture was more about recycling or remixing than creating out of whole cloth. Third, virtually every hip-hop artist renamed himself or herself; “slave” or “government” names were seldom used to describe the artists. Many hip-hop artists named themselves thinking of the criminal law. A short list includes rappers and groups such as Big Punisher, Bone Thugs-N-Harmony, Canibus, Missy “Misdemeanor” Elliot, Mobb Deep, Naughty by Nature, OutKast, and Public Enemy. Fourth, rappers were compared, almost from the beginning, to African griots, who also communicated wisdom (or, in the hip-hop lexicon, “dropped science”) with drum beats and words.³⁶

In 1979, the Sugarhill Gang’s “*Rapper’s Delight*” became the first hip-hop song to become a national hit.³⁷ Rap was immediately appropriated by white artists; the next year the new wave group Blondie produced “*Rapture*,” which reached the top of the charts. In the mid-1980s, groups like Run-DMC, the Beastie Boys (a white group that became the best selling and most critically acclaimed hip-hop act of the time), and Salt-N-Pepa (the first female hip-hop act of significance) had popular songs that attracted the attention of MTV,

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. See *WILD STYLE* (Rhino 1982) for a fictionalized film version of the dawn of hip-hop culture.

36. See Baruit N. Kopano, *Rap Music as an Extension of the Black Rhetorical Tradition: ‘Keepin It Real’*, 26 W. J. BLACK STUD. 204 (2002) (describing the rich gradations of rap music and explaining that “[i]t is a legacy that may go as far back as the griots of West Africa”); *Keeping Up with Jones: Quincy Jones, Pop Legend, Interview*, INTERVIEW MAG., Nov. 1995, at 28 (quoting Quincy Jones as noting that “rappers may not realize how deep the roots are with the griots from West Africa”).

37. The History of Hip-Hop, *supra* note 5.

which started, somewhat reluctantly, to show rap videos.³⁸

In the late 1980s, mainstream rap music took two divergent directions. Many artists addressed political issues, "resulting in the most overt social agenda in popular music since the urban folk movement of the 1960s."³⁹ A classic album of this era is Public Enemy's *It Takes a Nation of Millions to Hold Us Back*.⁴⁰ Chuck D, the group's lead singer, described rap as the "Black CNN."⁴¹

The other direction of rap, however, drew more attention, and sales. "Gangsta rap," which unapologetically depicted outlaw conduct in the innercity, became popular.⁴² The group NWA (Niggaz With Attitude) received widespread media attention for its controversial song "Fuck da Police."⁴³

Hip-hop music continues to exemplify this dichotomy between the politically correct and the world, real or imagined, of some artists. *The Washington Post* has described "two faces of hip-hop," one a "conscious" side "where political, social and cultural issues are hashed out in verse."⁴⁴ The other side is "the bling-bling, the music that embraces the glamorous life, the live-now-I-got-mine attitude found in countless hits, and in flashy videos where hootchy mamas bounce their backsides and Busta Rhymes exhorts, 'Pass the Courvoisier.'"⁴⁵

Conscious hip-hop is critically acclaimed, with Lauryn Hill's *The Miseducation of Lauryn Hill* becoming the first hip-hop album to receive the Grammy award for Record of the Year in 1999.⁴⁶ Since then Alicia Keys and

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. See, e.g., Jon Pareles, *Outlaw Rock: More Skirmishes on the Censorship Front*, N.Y. TIMES, Dec. 10, 1989, at § 2, 32; Juan Williams, *Fighting Words; Speaking Out Against Racism, Sexism and Gay-Bashing in Pop*, WASH. POST, Oct. 15, 1989, at G1.

44. Teresa Wiltz, *We the Peeps: After Three Decades Chillin' in the Hood, Hip-Hop Is Finding Its Voice Politically*, WASH. POST, June 25, 2002, at C1.

45. *Id.* The author Bakari Kitwana has also described "two sides" to hip-hop. He states: Hip-hop has a positive impact, but also has a negative impact in terms of these anti-black images and this misogynistic attitude that comes from rappers who sell multi-platinum records. Like Jay-Z. But at the same time Jay-Z offers a message that the society is screwed up, that it's difficult out here, that the issues of unemployment and education are critical issues. The music is contradictory but the messages that society is sending us are contradictory too. I don't think that it's unusual; I think that's how life is.

Suzy Hansen, *Hip-Hop Nation*, SALON, July 19, 2002 (quoting Bakari Kitwana), available at <http://archive.salon.com/books/int/2002/07/10/kitwana/> (last visited Mar. 31, 2004). Many hip-hop artists can not be placed in either category. Eminem, for example, is the best selling rap artist in history, and his music is neither political or gangsta.

46. See Mary Ellen Walker, *The Kids' Reading Room: Top of the News*, L.A. TIMES, Feb. 26, 1999, at E8 (noting Hill's was the first hip-hop album to win the Grammy for album of the year).

OutKast have also won top honors.⁴⁷

Gangsta and “bling bling” rap, on the other hand, have been derided as materialist, sexist, and homophobic,⁴⁸ but these forms of hip-hop have their defenders as well. They assert that the lyrics are accurate reflections of some people’s experiences or that the lyrics are not the most important, or artistic, element of the music. The scholar Tricia Rose describes hip-hop as a “hidden transcript . . . it uses cloaked speech and disguised cultural codes to comment on and challenge aspects of current power inequalities.”⁴⁹ Moreover, one person’s “conscious” rapper might be another person’s gangsta rapper. 50 Cent, who made the best selling album of 2003, is described by some critics as a gangsta rapper, and by others as someone whose music comments, critically, on the costs of violence and materialism.⁵⁰

A. Hip-Hop’s Influence: Consumers

The evolution that rap pioneers like Kool Herc and Afrikka Bambaataa probably did not foresee is the extraordinary success of their art form with suburban consumers. Market studies indicate that about seventy-five percent of people who buy hip-hop music are non-black.⁵¹ Over the last decade hip-hop music has surpassed country music in popularity. Hip-hop created the United States’ first African American billionaire, Robert Johnson, who sold BET, a cable network that plays hip-hop videos, to Viacom, the corporation that owns MTV.⁵²

Hip-hop has had a major impact on fashion, with rap stars like P. Diddy and Jay-Z presiding over houses of fashion that produce top selling men’s wear at Macy’s and Bloomingdale’s.⁵³ Hip-hop fashion pays homage to the

47. See Geoff Boucher, *The Grammy Awards*, L.A. TIMES, Feb. 28, 2002, at pt. 1, 13 (noting that, in 2002, Alicia Keys won five Grammy awards, including best new artist and song of the year); *46th Annual Grammys: Complete List of Winners*, BILLBOARD, Feb. 21, 2004, at 70 (noting OutKast’s “Speakerboxxx/The Love Below” won Grammy for album of the year).

48. See Cornel West, *Nihilism in the Black Community*, 1991 DISSENT 221.

49. TRICIA ROSE, *BLACK NOISE: RAP MUSIC AND BLACK CULTURE IN CONTEMPORARY AMERICA* 100 (1994).

50. See Kelefa Sanneh, *Music: The Highs; The Albums and Songs of the Year*, N.Y. TIMES, Dec. 28, 2003, at § 2, 31 (noting how 50 Cent’s “casual jokes about death are his way of reminding us of the price he might have to pay for his success—and for our entertainment”).

51. See Holloway, *supra* note 9.

52. See Richard Sandomir, *Founder of TV Network Becomes First Black Owner in Major Sports*, N.Y. TIMES, Dec. 19, 2002, at A1 (reporting that Robert Johnson sold BET to Viacom in 2000 for three billion dollars).

53. See Jeffrey McKinney, *From Rags to Riches: Hip-Hop Moguls Use Groundbreaking Designs and Star Power to Challenge Major Clothing Labels and Become a Force in the \$164 Billion Fashion Industry*, BLACK ENTERPRISE, Sept. 2002, available at <http://www.blackenterprise.com/printarticle.asp?source=/archive2002/09/0902-41.htm> (last

garments that prison inmates wear; it emphasizes loose, baggy clothing.⁵⁴ Hip-hop entrepreneurs have branched out into manufacturing and distributing products such as liquor,⁵⁵ energy drinks,⁵⁶ and gym shoes⁵⁷ and have launched marketing and advertising firms.⁵⁸

B. The Academy

Approximately seventy-five colleges and universities offer courses in hip-hop studies.⁵⁹ Harvard University's famed Afro-American studies department recently hired a specialist in hip-hop because, according to Professor Henry Louis Gates, "it is one of the most important cultural phenomenons in the second half of the twentieth century. We would be remiss if we did not treat it accordingly."⁶⁰ Hip-hop has critics in the academy as well, and some of their critiques have implications for this project's construction of a hip-hop theory of punishment. The Harvard historian Martin Kilson, for example, believes that hip-hop denigrates African American achievements in civil rights.⁶¹ John McWhorter of the University of California condemns hip-hop for being antiauthoritarian.⁶²

visited Jan. 31, 2004).

54. See John L. Mitchell, *Baggin' and Saggin': Parents Wary of a Big Fashion Trend*, L.A. TIMES, Sept. 28, 1992, at B1 (reporting that the "trend toward baggy clothing was started by some of Los Angeles' toughest gangs, emulating the garb of prison inmates whose pants perpetually sag because prisoners are not issued belts"); Guy Trebay, *Maturing Rappers Try a New Uniform: Yo, a Suit!*, N.Y. TIMES, Feb. 6, 2004, at A1 (explaining "[f]or most of the past decade, hip-hop credibility was linked to looking 'street,' a notion interpreted through styles that made reference to gang life (colored bandannas), the jailhouse (beltless jeans worn with one leg rolled) and subcultures in which the markers of cool were enmeshed in drug running and other activities as illicit as they were perversely glamorous").

55. See Rashaun Hall, *Hip-Hop a Hot Flavor: Drinks by Simmons, Nelly, Ice-T Cater to Fans*, BILLBOARD, Nov. 8, 2003, at 35 (reporting Ice-T's plan to manufacture "Royal Ice" malt liquor).

56. See *id.* (discussing Nelly's "Pimp Juice" and Russell Simmons' "Def Con 3" energy drinks).

57. See Gail Mitchell, *Marketers Value Hip-Hop's Cred*, BILLBOARD, May 31, 2003, at 1, 99.

58. See Cassandra Hayes, *B.E. Advertising Agencies Overview: Massacre on Madison Avenue*, BLACK ENTERPRISE, June 2003, at 186 (listing Spike Lee's DDB Advertising firm among its list of top advertising agencies).

59. For a list of the syllabi for these courses, see The Hip-Hop Archive, Course Listings, at http://www.hiphoparchive.org/research/course_listings.htm (last visited Feb. 5, 2004).

60. Sara Rimer, *Harvard Scholar Rebuilds African Studies Department*, N.Y. TIMES, July 16, 2003, at A16.

61. Martin Kilson, *The Pretense of Hip-Hop Black Leadership*, BLACK COMMENTATOR, July 17, 2003, available at http://www.blackcommentator.com/50/50_kilson.html (last visited Feb. 5, 2004).

62. John H. McWhorter, *How Hip-Hop Holds Blacks Back*, CITY J., Summer 2003, available at http://www.city-journal.org/html/13_3_how_hip_hop.html (last visited Mar. 28,

C. Hip-Hop as a Political Movement

Some members of the hip-hop nation explicitly have embraced politics. The most prominent is Russell Simmons, the multimillionaire coowner of Def Jam, a hip-hop record label.⁶³ Simmons created the Hip-Hop Summit Action Network (“HSAN”), a nonprofit organization “dedicated to harnessing the cultural relevance of Hip-Hop music to serve as a catalyst for education advocacy and other societal concerns fundamental to the well-being of at-risk youth throughout the United States.”⁶⁴ One of HSAN’s objectives is to register two million new voters for the 2004 presidential election.⁶⁵ In one measure of Simmons’ influence, all but one of the major Democratic candidates for President in 2004 met with him.⁶⁶

HSAN has emphasized reform of the criminal justice system, including the “total elimination of police brutality and the unjust incarceration of people of color and all others.”⁶⁷ It seeks “the end and repeal of all repressive legislations [sic], laws, regulations and ordinances such as . . . federal and state mandatory minimum sentencing; trying and sentencing juveniles as adults; sentencing disparities between crack and powdered cocaine use; [and] capitol [sic] punishment . . .”⁶⁸

HSAN focus has been the repeal of New York’s Rockefeller drug laws. These laws, first passed in 1973 by Governor Nelson Rockefeller, require long prison sentences for drug crimes.⁶⁹ The organization’s “Countdown to Fairness” campaign was intended to accomplish repeal of the Rockerfeller laws by June 2003.⁷⁰ Its campaign was endorsed by the Congressional Black

2004).

63. See Dasun Allah, *The Swami of Hip-Hop: Russell Simmons Morphs into a Mogul-Activist*, VILLAGE VOICE, Sept. 4, 2002, available at <http://villagevoice.com/issues/0236/allah.php> (last visited Jan. 31, 2004).

64. Hip-Hop Summit Action Network, Our Mission, at <http://www.hiphopsummitactionnetwork.org/content/main.aspx?pageid=7> (last visited Mar. 5, 2004).

65. See Ta-Nehisis Coates, *Compa\$\$ionate Capitali\$\$m: Russell Simmons Wants to Fatten the Hip-Hop Vote—and Maybe His Wallet, Too*, VILLAGE VOICE, Jan. 7, 2004, available at <http://www.villagevoice.com/issues/0401/coates.php> (last visited Mar. 28, 2004) (describing the registration of 11,000 new voters at a hip-hop summit in Philadelphia attended by rap stars LL Cool J, Will Smith, and DMX, and a hip-hop summit in Detroit that attracted 17,000 people).

66. See Dasun Allah, *The 2004 Black Agenda: Will Candidates Deliver for the African American Vote?*, VILLAGE VOICE, Dec. 24, 2003, available at <http://www.villagevoice.com/issues/0352/allah.php> (last visited Mar. 28, 2004).

67. Hip-Hop Summit Action Network, What We Want, at <http://www.hiphopsummitactionnetwork.org/Content/main.aspx?pageid=27> (last visited Mar. 28, 2004).

68. *Id.*

69. Press Release, Hip-Hop Summit Action Network, Growing National Momentum Builds for “Countdown to Fairness” Campaign to Repeal Rockefeller Drug Laws in New York (May 12, 2003), available at <http://www.hiphopsummitactionnetwork.org/media/PDF/oldPressReleases/GROWING.pdf> (last visited Mar. 28, 2004).

70. Media Advisory, Hip-Hop Summit Action Network, Russell Simmons, Sean “P.

Caucus, the National Urban League, the NAACP, and both Hilary Clinton and Chuck Schumer, New York's United States Senators.⁷¹

HSAN sponsored a protest rally featuring P. Diddy, Jay-Z, and Mariah Carey that attracted 20,000 people.⁷² HSAN did not, however, succeed in getting the Rockefeller laws repealed within its stated time frame.⁷³

Other efforts to politically organize the hip-hop community include the "Rap the Vote" project and the National Hip-Hop Political Convention.⁷⁴ The Internet contains numerous sites dedicated to inspiring activism in the hip-hop nation.⁷⁵

D. *The Limits of Hip-Hop's Influence*

I want to be careful not to overstate hip-hop's role as a political force in the United States. Compared to its cultural and economic power, hip-hop's political influence is not strong. In fact, hip-hop's primary constituent groups—young people and artists—are well known for their lack of participation in traditional electoral politics.⁷⁶ Hip-hop's role in law and policy, at least for now, will be determined more by the strength of its vision than by its community's potency at the ballot box. The rest of this Article is intended to make the case that its vision, though undertheorized, has the potential to transform the United States into a safer, more just society.

Diddy" Combs and the Hip-Hop Summit Action Network Together with Andrew Cuomo and the Mothers of the NY Disappeared to Announce Final 7-Day Countdown to Massive Rally at City Hall/Foley Square (May 27, 2003), available at <http://www.hiphopsummitactionnetwork.org/media/PDF/oldPressReleases/May28thAdvisoy.pdf> (last visited Mar. 28, 2004).

71. Press Release, *supra* note 69.

72. See Coates, *supra* note 65.

73. For an account of why HSAN's campaign was unsuccessful, see *id.* After HSAN sponsored protests, New York City Mayor Michael Bloomberg restored approximately \$300 million to the city public schools budget. A HSAN demonstration on the proposed budget cuts featured hip-hop stars like Sean "P. Diddy Combs, Alicia Keys, LL Cool J, and drew between 50,000 and 100,000 people. See Hansen, *supra* note 45; see also Wiltz, *supra* note 44.

74. National Hip-Hop Political Convention, at <http://www.hiphopconvention.org> (last visited Feb. 5, 2004).

75. See, e.g., Davey D's Hip Hop Corner, at <http://www.daveyd.com> (last visited Mar. 5, 2004); The Hip-Hop Summit Action Network, at <http://www.hiphopsummitactionnetwork.org> (last visited Mar. 5, 2004); The Temple of Hip Hop, at <http://www.templeofhiphop.org> (last visited Mar. 5, 2004).

76. See FED. ELECTION COMM'N, *supra* note 13.

III. HIP-HOP AND SOCIAL NORMS

Shout to my niggaz that's locked in jail
P.O.W.'s that's still in the war for real . . .
But if he's locked in the penitentiary, send him some energy
They all winners to me
—Jay-Z⁷⁷

What happens when many of the leaders of popular culture are arrested and incarcerated? For the hip-hop nation, this is not a theoretical question. Many of its most prominent artists have been involved in the criminal justice system.⁷⁸ So many have been arrested that the *Village Voice* recently questioned whether the New York Police Department has a secret unit dedicated to hip-hop artists.⁷⁹ Police in Miami admitted that they secretly watched and kept dossiers on hip-hop stars who visited South Florida.⁸⁰

A telling example of the role of punishment in the hip-hop nation can be seen in a recent issue of *Source* magazine, which bills itself as the “bible” of hip-hop. The March 2004 cover featured the tag-line: “Hip-Hop Behind Bars: Are Rappers the New Target of America’s Criminal Justice System?”⁸¹ The magazine’s cover featured mug shots of ten hip-hop artists who are incarcerated or awaiting trial.⁸²

The statistics about rap artists reflect the statistics about young African American and Latino men. In the mid-1990s, one study found that one in three young black men were under criminal justice supervision.⁸³ An African

77. Jay-Z, *A Ballad for the Fallen Soldier*, on THE BLUEPRINT 2: THE GIFT & THE CURSE (Roc-A-Fella Records 2002) (lyrics available at Original Hip-Hop (Rap) Lyrics Archive, at http://ohhla.com/anonymous/jigga/the_gift/a_ballad.jyz.txt (last visited Mar. 5, 2004)).

78. See, e.g., Alan Feuer, *Metro Briefing New York: Brooklyn: Combs Trial Figure Arrested*, N.Y. TIMES, June 15, 2001, at B6 (reporting that P. Diddy was arrested for violating a federal weapons law); Robert D. McFadden, *Correction Officer and Visiting Policeman Shot After Assault at Midtown Club*, N.Y. TIMES, Mar. 6, 2000, at B3 (reporting that Jay-Z was arrested for stabbing record promoter Lance Rivera at a night club); Lola Ogunnaike, *Amid Much Anticipation, a Rap Artist Makes a Debut*, N.Y. TIMES, Feb. 6, 2003, at E1 (reporting that former crack dealer 50 Cent was arrested for possession of two loaded handguns).

79. Juan Pablo, *Rappers’ Lament*, VILLAGE VOICE, Dec. 17, 2003, available at <http://www.villagevoice.com/issues/0351/pablo.php> (last visited Mar. 28, 2004) (reporting “rumors of a ‘Hip-Hop Task Force’—a kind of Rap COINTELPRO—with the New York City Police Department”).

80. See Nicole White & Evelyn McDonnell, *Police Secretly Watching Hip-Hop Artists*, MIAMI HERALD, Mar. 9, 2004, at 1A (describing police secret surveillance of hip-hop artists in Miami and Miami Beach).

81. SOURCE, Mar. 2004 (referencing the article *Operation Lockdown*, SOURCE, Mar. 2004, at 107).

82. *Id.* The artists included Shyne, Chi-Ali, and Mystikal.

83. See Pierre Thomas, *1 in 3 Young Black Men in Justice System*, WASH. POST, Oct. 5,

American man born in 1991 has a 29% chance of being imprisoned, compared with a 16% chance for a Latino man, and a 4% chance for a white man.⁸⁴ There are more young black men in prison than in college.⁸⁵

The reaction of artists in the hip-hop community to the mass incarceration of African Americans has been to interrogate the social meaning of punishment. Prison, as depicted in rap music, is a placement center for the undereducated, the unemployed, and, especially, aspiring capitalists who, if not locked up, would successfully challenge white elites. Big L, for example, complains that the police "wanna lock me up even though I'm legit/ they can't stand to see a young brother pockets get thick."⁸⁶

Criminologists and legal scholars recently have emphasized the role of social norms in preventing crime. In the strongest form, the idea is that cultural (or subcultural) forces are more important than criminal law in determining conduct. We care more about how people in our communities label us than how the law does. The appropriate role of criminal law, then, is to support social mores that contribute to public safety. Criminal law fails when it subverts those norms.⁸⁷ When, for example, incarceration is not sufficiently stigmatized, it loses its value as deterrence.

To say that hip-hop destigmatizes incarceration understates the point: Prison, according to the artists, actually stigmatizes the government. In a culture that celebrates rebelliousness, prison is the place for unruly "niggas" who otherwise would upset the political or economic status quo. In this sense, inmates are heroic figures.⁸⁸ In "*A Ballad for the Fallen Soldier*," Jay-Z sends a "shout out to my niggaz that's locked in jail/ P.O.W.'s that's still in the war for real . . . But if he's locked in the penitentiary, send him some energy/ They all winners to me."⁸⁹

While glorification of outlaws is certainly not limited to hip-hop,⁹⁰ the culture's depiction of the criminal as a socially useful actor is different. Hip-

1995, at A1; *see also* MAUER, *supra* note 12, at 125 (citing BONCZAR & BECK, *supra* note 12) (describing an earlier study in which the statistic was 1 in 4).

84. MAUER, *supra* note 12, at 125.

85. *See* Fox Butterfield, *Study Finds Big Increase in Black Men as Inmates Since 1980*, N.Y. TIMES, Aug. 28, 2002, at A14 (discussing a study that found that there are more black men in prison than in colleges or universities).

86. Big L featuring Fat Joe, *The Enemy*, on THE BIG PICTURE (Priority Records 2000) (lyrics available at Original Hip-Hop (Rap) Lyrics Archive, *at* http://ohhla.com/anonymous/dtc/dtc/da_enemy.dtc.txt (last visited Mar. 7, 2004)).

87. *See* Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191 (1998).

88. *See* MICHEL FOUCAULT, *DISCIPLINE AND PUNISHMENT: THE BIRTH OF THE PRISON* 277-78 (Alan Sheridan trans., 1977) (1975).

89. Jay-Z, *supra* note 77.

90. American films like *THE GODFATHER* (Paramount 1972), *SCARFACE* (Universal Studios 1983), and *PULP FICTION* (Miramax Home Entertainment 1994), like gangsta rap, depict criminals as imperfect heroes.

hop justifies rather than excuses some criminal conduct. Breaking the law is seen as a form of rebelling against the oppressive status quo. Rappers who brag about doing time are like old soldiers who boast of war wounds.

The hip-hop slang for being arrested demonstrates the culture's view of the almost arbitrary nature of criminal justice. One "catches a case."⁹¹ The language connotes the same combination of responsibility and happenstance as when one "catches" the common cold.

Hip-hop suggests that American punishment is not mainly designed to enhance public safety or for retribution against the immoral. Rather, its critique of punishment echoes that of the philosopher Michel Foucault, who argued that prison is designed to encourage a "useful illegality" that benefits the state. The scholar Robin Kelley notes that "most rappers—especially gangsta rappers—treat prisons as virtual fascist institutions."⁹²

That the hip-hop perspective on punishment is the opposite of the way citizens are expected to think is exactly the point. Hip-hop scholar Tricia Rose explains:

[A] large and significant element in rap's discursive territory is engaged in symbolic and ideological warfare with institutions and groups that symbolically, ideologically, and materially oppress African Americans. . . . [R]appers act out inversions of status hierarchies . . . and draw portraits of contact with dominant groups in which the hidden transcript inverts/subverts the public, dominant transcript.⁹³

Thus, in order to maintain their self-esteem, the African American men who dominate hip-hop connote that any organization that is composed primarily of people like them must be kind of cool; it matters not whether that organization is the National Basketball Association, Morehouse College, or the state penitentiary. Since these men wield significant influence over what the nation's youth think is cool, it may be only a matter of time before punishment loses its stigma with other Americans as well.

The United States has the second highest incarceration rate in the world.⁹⁴

91. See, e.g., G-Unit, *G'up, on BEG FOR MERCY* (Interscope 2003) (lyrics available at Original Hip-Hop (Rap) Lyrics Archive, at http://www.ohhla.com/anonymous/g_unit/begmercy/gd_up.unt.txt (last visited Mar. 12, 2004)) ("Cocaine, heroin, ecstasy, marijuana/ I'm mule on that Greyhound from NY to the Carolina/ Paper chase, different name, same face, don't catch a case."); Jay-Z featuring Babyface and Foxy Brown, *Sunshine, on IN MY LIFETIME, VOLUME 1* (Universal 1997) (lyrics available at Original Hip-Hop (Rap) Lyrics Archive, at <http://ohhla.com/anonymous/jigga/lifetime/sunshine.jyz.txt> (last visited Mar. 12, 2004)) ("If I needed would you give me your kidneys? (Uhh, uhh, fo'sho')/ Catch a case you catch it with me? (Mmm, fo'sho').").

92. Robin D.G. Kelley, *Kickin' Reality, Kickin' Ballistics: Gangsta Rap and Postindustrial Los Angeles*, in *DROPPIN' SCIENCE: CRITICAL ESSAYS ON RAP MUSIC AND HIP HOP CULTURE* 135 (William Eric Pekins ed., 1996) [hereinafter *DROPPIN' SCIENCE*].

93. ROSE, *supra* note 49, at 100-01.

94. See MAUER, *supra* note 12, at 23 fig.2-3. Russia has the highest incarceration rate. *Id.*

Hip-hop artists are the most visible critics of the massive punishment regime.⁹⁵ Considering the diversity of the hip-hop nation, their united front on this issue is remarkable. They disagree about many controversial issues, including capitalism, feminism, gay and lesbian rights, abortion, religion, and immigration. On the social meaning of punishment, however, the hip-hop nation virtually speaks as one. Indeed the central point of agreement between gangsta rap and conscious hip-hop is their joint critique of American criminal justice, especially its heavy reliance on prison.⁹⁶

In "All Things," Pep Love, of the rap collective Hieroglyphics, laments, "The pen is an inkwell, niggaz is slaves/ Even if we not locked up, we on our way."⁹⁷ When popular culture presents prison as a rite of passage, punishment begins to lose its deterrent effect. If punishment is to be meaningful, it must be reinvested with stigma. We could accomplish this by using prison less frequently and more effectively. The next section suggests a way.

IV. PUNISHMENT: THE REMIX

When the prisoners began to speak, they possessed an individual theory of prisons, the penal system, and justice. It is this form of discourse which ultimately matters, a discourse against power, the counter-discourse of prisoners and those we call delinquents. . . .

—Michel Foucault⁹⁸

Every society has seen the need to punish. The hip-hop nation is no different. Three core principles inform its ideas about punishment. First, people who harm others should be harmed in return. Second, criminals are human beings who deserve respect and love. Third, communities can be destroyed by both crime and punishment.

How would these ideas contribute to a theory of punishment? In a sense the hip-hop nation, and especially its black and Latino citizens, are best situated to design a punishment regime. The philosopher John Rawls suggests that law is most just when it is made by people who don't know how they will fare under

95. Many activists and scholars also address the issue, as do some African American and Latino lawmakers. The phenomenon of mass incarceration is mainly ignored by most white politicians or embraced as a public good.

96. Professor Ernest Allen, Jr. has noted other similarities between gangsta rap and conscious rap (which he describes as "visionary message rap"), including that both reinforce the subjugation of women and that both celebrate the rebel. See Ernest Allen, Jr., *Making the Strong Survive: The Contours and Contradictions of Message Rap*, in DROPPIN' SCIENCE, *supra* note 92.

97. Hieroglyphics, *All Things*, on THIRD EYE VISION (Hieroglyphics Imperium Records 1998) (lyrics available at Original Hip-Hop (Rap) Lyrics Archive, at <http://ohhla.com/anonymous/hiero/thirdeye/things.hie.txt> (last visited Mar. 5, 2004)).

98. MICHEL FOUCAULT, *Intellectuals and Power*, in LANGUAGE, COUNTER-MEMORY, PRACTICE: SELECTED ESSAYS AND INTERVIEWS 205, 209 (Donald F. Bouchard & Sherry Simon trans., Donald F. Bouchard ed., 1977).

it.⁹⁹ It is impossible, of course, to actually live in Rawls' netherworld. As Rawls recognized, our instinct is to assess public policy from the standpoint of our individual interest. Since, however, minority members of the hip-hop nation are the most likely to be arrested and incarcerated for crimes—and also the most likely to be victims of crimes¹⁰⁰—they get closer to the netherworld than most of us.¹⁰¹ Ideally their theory of punishment will value both public safety and fairness to lawbreakers.

This project is not intended to suggest that hip-hop culture has explicitly constructed a theory of punishment. The claim is more limited, but still, I hope, profound. Thousands of hip-hop songs consider crime and punishment. These voices are worth listening to—they evaluate criminal justice from the bottom up.¹⁰² Our current punishment regime has been designed from the top down, and that, in part, explains why many perceive it to be ineffective or unfair. We might punish better if the ghetto philosophers and the classic philosophers met. They address many of the same issues in punishment, including causation, harm, responsibility, excuse, and justification.

We would see that Erykah Badu, Snoop Dogg, and Jeremy Bentham have a lot in common. Immanuel Kant and Jay-Z would get along well, but their differences would be instructive. Not all of the artists are brilliant theorists, although some of them are. They represent, however, a community that has borne the brunt of the world's 200-year experiment with prison. That community knows much, has laid it down on tracks, and now attention must be paid.

We should not look to hip-hop culture for an entirely new justification of

99. See generally JOHN RAWLS, A THEORY OF JUSTICE (1971) (advancing this theory).

100. For hip-hop songs expressing sympathy for victims of crime, see Ice Cube, *Dead Homiez, on KILL AT WILL* (Priority Records 1990) (lyrics available at Original Hip-Hop (Rap) Lyrics Archive, at http://ohhla.com/anonymous/ice_cube/killwill/homiez.cub.txt (last visited Mar. 4, 2004)); Stop the Violence All-Stars, *Self Destruction, on SELF DESTRUCTION 12"* (1989) (lyrics available at Original Hip-Hop (Rap) Lyrics Archive, at http://ohhla.com/anonymous/misc/hip-hop/self_des.stv.txt (last visited Mar. 4, 2004)); The West Coast Rap All-Stars, *We're All in the Same Gang, on WE'RE ALL IN THE SAME GANG* (Warner Brothers Records 1990) (lyrics available at Original Hip-Hop (Rap) Lyrics Archive, at http://www.ohhla.com/anonymous/rap_comp/samegang/samegang.gng.txt (last visited Mar. 4, 2004)).

101. See U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2000 STATISTICAL TABLES tbl.6 (2002), available at <http://www.ojp.gov/bjs/pub/pdg/cvus00.pdf> (last visited Mar. 1, 2004) (finding victimization rates for all personal crimes for males age twelve and over to be 45.1% for black men compared to 32.8% for white men); *id.* at tbl.8 (finding victimization rates for crimes of violence for Hispanic males age twelve and over to be 33.2% compared to 32.7% for non-Hispanic males age twelve and over).

102. See Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978) (contrasting the "victim" and "perpetrator" perspectives in antidiscrimination law); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987) (arguing for the inclusion of the voices of those at the "bottom" in legal scholarship).

punishment. Hip-hop culture does not create out of whole cloth, and neither do the philosophers, scholars, and lawmakers who have articulated the current punishment regime. The art of hip-hop is in the remix. Thus some hip-hop overtly responds to trendy theories of punishment. The "broken window" theory of law enforcement, for example, has had a profound impact on the ghetto and thus on hip-hop culture.¹⁰³ Other elements of hip-hop can be interpreted as unconscious shout-outs to scholars of whom the artists probably are not aware. Foucault's influential history of the prison reverberates throughout hip-hop theory, as does the new criminal law scholarship on third party interests in criminal law and the effects of mass incarceration. Hip-hop culture, though, is post-postmodern. In fact, some of its characteristics, especially its embrace of retribution, seem startlingly old-fashioned.

I want to begin a discussion about a hip-hop theory of punishment by focusing on three classic problems in punishment theory. Why do we punish? What should we punish? How should we punish? I will identify six principles from hip-hop culture that address these issues.¹⁰⁴ First, the purpose of punishment should be retribution. Second, punishment should be limited (but not determined) by utilitarian concerns, especially the effect of punishment on people other than the lawbreaker. Third, punishment should be designed to "catch" the harm caused by rich people more than poor people. Fourth, people probably should not be punished for using or selling intoxicants. Fifth, punishment should be imposed only by people within a community, not outsiders. Sixth, prison should be used sparingly as an instrument of punishment.

A. *Why Punish?*

I ain't God but I'll pretend.

—Eve¹⁰⁵

103. For a discussion of the "broken window" theory of law enforcement, see James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 29. For a reaction from hip-hop to former New York City mayor Rudolph Giuliani's endorsement of "zero tolerance" policing, see Brand Nubian, *Probable Cause*, on FOUNDATION (Arista Records 1998) (lyrics available at Original Hip-Hop (Rap) Lyrics Archive, at <http://ohhla.com/anonymous/brnubian/found/probable.brn.txt> (last visited Mar. 7, 2004)) ("I ain't do shit! Jakes lock a nigga with a weed clip . . . Now Giuliani wanna talk about the 'Quality of Life' / Think he got the right to follow me at night/ with no probable cause, other than my skin is black like yours.").

104. This theory is constructed from my reading of the values and concerns expressed in hip-hop culture. It is not intended to be definitive or exhaustive. It is intended to provoke debate.

105. Eve, *Love Is Blind*, on RUFF RYDERS' FIRST LADY (Interscope Records 1999) (lyrics available at Original Hip-Hop (Rap) Lyrics Archive, at http://ohhla.com/anonymous/eve/firs:idy/is_blind.eve.txt (last visited Mar. 5, 2004)).

1. Retribution and respect in hip-hop.

Hip-hop lyrics exhibit a strong conviction that wrongdoers should suffer consequences for their acts. In the words of Jay-Z: “Now if you shoot my dog, I’m gonna kill yo’ cat/ Just the unwritten laws in rap—know dat/ For every action there’s a reaction.”¹⁰⁶ The culture abounds with narratives about revenge, retaliation, and avenging wrongs. The narrator in Eve’s *“Love is Blind”* kills the man who abuses her close friend.¹⁰⁷ Likewise, Nelly warns “if you take a life, you gon’ lose yours too.”¹⁰⁸

At the same time, hip-hop culture seems to embrace criminals. In Angie Stone’s *“Brotha,”* for example, she sings, “To everyone of y’all behind bars/ You know that Angie loves ya.”¹⁰⁹ To an incarcerated person Jay-Z seeks to “send . . . some energy” because “if he’s locked in the penitentiary . . . They all winners to me.”¹¹⁰ This kind of warm acknowledgement of the incarcerated is commonplace in hip-hop, and virtually unheard of in other popular culture, which largely ignores the two million Americans in prison.

The most important civic virtue in the hip-hop nation is respect. One of the culture’s contributions to the English language is the verb “dis,” which means “to disrespect.”¹¹¹ To dis someone is worse than to insult them—it is to deny his or her humanity. Hip-hop vocabulary also includes the term “props”—to give props is to afford proper respect.¹¹² The misogyny and homophobia in some hip-hop makes it difficult to claim a universal value of respect for all persons.¹¹³ Virtually all hip-hop, however, connotes a respect for the dignity of lawbreakers.

In attempting to reconcile hip-hop’s impulse for righting wrongs with its

106. Jay-Z, *supra* note 3.

107. Eve, *supra* note 105.

108. Nelly, *Nellyville*, on NELLYVILLE (Universal Records 2002) (lyrics available at Original Hip-Hop (Rap) Lyrics Archive, at <http://ohhla.com/anonymous/nelly/ville/nv.nel.txt> (last visited Mar. 5, 2004)). For other examples of retributivism, see Notorious B.I.G., *Somebody’s Gotta Die*, on LIFE AFTER DEATH (Bad Boy Records 1997); Mystikal, *Murder 2*, on UNPREDICTABLE (Jive Records 1997).

109. Angie Stone, *Brotha*, on MAHOGANY SOUL (J-Records 2001) (lyrics available at Lyrics Time, Angie Stone Lyrics—Brotha (Remix), at <http://www.lyricstime.com/lyrics/2682.html> (last visited Feb. 4, 2004)).

110. Jay-Z, *supra* note 77.

111. A definition can be found at [urbandictionary.com](http://www.urbandictionary.com/define.php?term=dis&f=1), <http://www.urbandictionary.com/define.php?term=dis&f=1> (last visited Mar. 5, 2004) (displaying the results of searching the term “dis”).

112. A definition can be found at [urbandictionary.com](http://www.urbandictionary.com/define.php?term=props&f=1), <http://www.urbandictionary.com/define.php?term=props&f=1> (last visited Mar. 5, 2004) (displaying the results of searching the term “props”).

113. See Michelle Goodwin, *The Economy of Citizenship*, 76 TEMP. L. REV. 129, 192 (2003) (discussing misogyny in rap music and noting how “Ice T, Ice Cube, Dr. Dre, Snoop Dogg, N.W.A., Slick Rick Jason Lewis, UGK and many more contribute to the denigration of women”).

respect for dignity—even the dignity of criminals—a criminal law scholar immediately thinks of retribution. This justification of punishment is premised on the idea of “just deserts.”¹¹⁴ When one harms another, justice requires that she be harmed in return. Retributivists believe than punishment communicates respect for the criminal by recognizing him as a moral agent and respect for the victim by avenging his harm.

The Bill of Rights codifies the retributive concern for the criminal’s humanity. The Eighth Amendment prohibits the state from punishing criminals in a manner that is inconsistent with their dignity. The Supreme Court has also interpreted the Eighth Amendment as requiring that criminals not be punished disproportionately to their crime, although it has given lawmakers wide latitude in determining what proportionate punishment is.¹¹⁵

How would a profound respect for the humanity of criminals change the way we punish them? It might require a more meaningful concept of proportionate punishment than the Supreme Court has currently endorsed.¹¹⁶ Harsh sentences for drug crimes, for example, are premised on utilitarian, not retributive, justifications.¹¹⁷ Such penalties have been the subject of much criticism in the hip-hop community. They have been defended by police and lawmakers on the ground that they keep drugs out of low-income and minority communities. If this assertion is true, it would not persuade retributivists, who require proportionality even when disproportionate punishment is socially useful.¹¹⁸ While I will later suggest that the hip-hop nation probably would not punish drug users, if it did, its embrace of retribution means they would be

114. For a famous exposition of retribution, see IMMANUEL KANT, THE PHILOSOPHY OF LAW 194-98 (W. Hastie trans., 1887) (1797) (“Even if a Civil Society resolved to dissolve itself . . . the last Murderer lying in the prison ought to be executed before the resolution was carried out This ought to be done in order that every one may realize the desert of his deeds”).

115. See generally Lockyer v. Andrade, 538 U.S. 63 (2003) (upholding the constitutionality of a defendant’s sentence to two consecutive terms of 25 years to life for stealing \$68.84 worth of videotapes from a K-Mart store); Harmelin v. Michigan, 501 U.S. 957 (1991) (upholding a defendant’s sentence of life without parole for possession of cocaine).

116. See *Andrade*, 538 U.S. at 63.

117. See, e.g., Sara Sun Beale, *What’s Law Got To Do with It?: The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 56 (1997) (“It seems doubtful whether drug offenses evoke the strongest retributive impulses. It seems more likely that three strikes and mandatory minimum legislation [for drug offenses] is based upon a deterrent view of the purpose of criminal sanctions.”); Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 914 n.190 (1990) (“[I]n the area of crimes related to drugs, crime control goals rather than just deserts seemed to prevail”).

118. Michael S. Moore, *The Moral Worth of Retribution*, in RESPONSIBILITY, CHARACTER AND EMOTIONS 179 (Ferdinand Schoeman ed., 1987) (“[R]etributivists [are] . . . committed to the principle that punishment should be graded in proportion to desert”).

punished significantly less than they are now.¹¹⁹

Hip-hop theory would reject or modify some elements of retribution. Assaultive retribution, for example, is premised on hate of the criminal, which is the opposite of the hip-hop perspective.¹²⁰ More significantly, however, some theories of retribution are premised on a world in which benefits and burdens are distributed equally; it is just to punish the criminal, the argument goes, when he upsets the balance.¹²¹

The hip-hop nation does not share this world view; it sees benefits and burdens as allocated in an uneven and racialist manner. Through this lens, the “choice” of a poor person to sell drugs has a different and less blameworthy social meaning than the choice of a middle class person to engage in, say, insider trading.¹²² In “*Dope Man*,” Jay-Z raps, “I grew where you hold your blacks up/ Trap us, expect us not to pick gats up/ Where you drop your cracks off by the Mack Trucks/ Destroy our dreams of lawyers and actors/ Keep us spiralin’, goin’ backwards.”¹²³

Hip-hop culture, like retributive philosophy, emphasizes the importance of moral autonomy and free agency.¹²⁴ Both posit that people who freely choose to do wrong should be punished. Where hip-hop theorists and traditional retributivists diverge, however, is on how to determine responsibility for individual acts. Hip-hop culture emphasizes the role of environment in determining conduct, whereas classic retributivist theory focuses on individual

119. For an expanded argument that retributive punishment would lower sentences for drug crimes, see Paul Butler, *Retribution, for Liberals*, 46 UCLA L. REV. 1873, 1884-88 (1999).

120. See Joshua Dressler, *Hating Criminals: How Can Something That Feels So Good Be Wrong?*, 88 MICH. L. REV. 1448, 1451-53 (1990) (“The most famous exponent of assaultive variety [of retributivism] is James Stephen, who claimed that ‘it is morally right to hate criminals.’ Under Stephen’s view, punishment is justified without any consideration of the criminal’s rights or best interests”).

121. See HERBERT MORRIS, ON GUILT AND INNOCENCE 34 (1976) (“It is just to punish those who have violated the rules and caused the unfair distribution of benefits and burdens. A person who violates the rules has something others have—the benefits of the system—but by renouncing what others have assumed, the burdens of self-restraint, he has acquired an unfair advantage. . . . Justice—that is punishing such individuals—restores the equilibrium of benefits and burdens by taking from the individual what he owes, that is, exacting the debt.”).

122. See Kelley, *supra* note 92 (“Moreover, economic restructuring resulting in massive unemployment has created criminals out of black youth, which is what gangsta rappers acknowledge. But rather than apologize or preach, they attempt to rationalize and explain.”).

123. Jay-Z, *Dope Man*, on VOLUME 3: THE LIFE AND TIMES OF S. CARTER (Roc-A-Fella Records 1999) (lyrics available at Original Hip-Hop (Rap) Lyrics Archive, at http://ohhla.com/anonymous/jigga/volume_3/dope_man.jyz.txt (last visited Mar. 5, 2004)). For a similar perspective, see ICE CUBE, KILL AT WILL (Priority Records 1990).

124. “[R]etributivism is based on the view that humans generally possess free will (or, perhaps more usefully, the capacity for free choice), and, therefore, may justly be blamed when they choose to violate society’s mores.” JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 16 (3d ed. 2001) (footnotes omitted).

choice. In essence, hip-hop culture discounts responsibility when criminal conduct has been shaped by a substandard environment. OutKast, for example, asserts “knowing each and every nigger sellin’, but can you blame/ The fact the only way a brother can survive the game.”¹²⁵

The hip-hop analysis does not deny that the poor are moral agents; it is instead a quasienteristic or empirical claim about the nature of free choice. In the words of NWA:

[A] nigga wit’ nothin’ to lose
 One of the few who’s been accused and abused
 Of the crime of poisonin’ young minds
 But you don’t know shit ‘til you’ve been in my shoes¹²⁶

2. Hip-hop utility: Third party interests and the effects of mass incarceration.

What you gonna do when they come for you
 Work ain’t honest but it pays the bills
 What we gonna do when they come for you
 God I can’t stand life withoutcha

—Erykah Badu¹²⁷

Punishment has had a profound effect on some American communities.¹²⁸ There are neighborhoods where so many men are locked up that a male presence seems palpably absent.¹²⁹ It approaches gross understatement to note that a community feels it when, as for African Americans, more young men are in prison than in college.

Hip-hop is concerned with the collateral effects of punishment. It acknowledges that even when punishment is deserved, there may be severe and unintended consequences. Dorothy Roberts has described three ways that mass incarceration harms the African American. It damages social networks, infects

125. OutKast, *Mainstream*, on ATLIENS (LaFace Records 1996) (lyrics available at Original Hip-Hop (Rap) Lyrics Archive, at <http://www.ohhla.com/anonymous/outkast/atliens/main.otk.txt> (last visited Mar. 5, 2004)).

126. NWA, *100 Miles and Runnin'*, on 100 MILES AND RUNNIN' (Priority Records 1990) (lyrics available at Original Hip-Hop (Rap) Lyrics Archive, at http://www.ohhla.com/anonymous/nwa/100_mile/100_mile.nwa.txt (last visited Mar. 5, 2004)).

127. Erykah Badu, *The Other Side of the Game*, on BADUIZM (Universal Records 1997) (lyrics available at Original Hip-Hop (Rap) Lyrics Archive, at <http://www.ohhla.com/anonymous/badu/baduizm/other.bdu.txt> (last visited Mar. 5, 2004)).

128. See Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004) (appearing in this Symposium).

129. See Todd R. Clear, *The Problem with “Addition by Subtraction”: The Prison-Crime Relationship in Low-Income Communities*, in INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 181, 184 (Marc Mauer & Meda Chesney-Lind eds., 2002) (describing urban areas in which one in four men is incarcerated).

social norms, and destroys social citizenship.¹³⁰

Hip-hop has catalogued a number of these harms. Damage to social networks, especially, is a consistent theme. Makaveli, for example, notes that families suffer when incarcerated parents cannot provide for their children. He states: “My homeboy’s doin life, his baby mamma be stressin’/ Sheddin’ tears when her son, finally ask that questions/ Where my daddy at? Mama why we live so poor?”¹³¹

Should such consequences be considered when an individual offender is punished?¹³² Classic retributivists believe that social considerations are immoral. The message from hip-hop, on the other hand, is that such considerations are essential.¹³³ Hip-hop culture advocates retribution—but not at all costs. If the consequence of making people pay for their crimes is the decimation of a community, then retribution is less important.

Professor Darryl Brown observes that “mitigating third-party interests . . . is necessary to maintain the legitimacy of criminal law, even as conflicting commitments to distributive fairness, retributive justice, and crime prevention necessitate some punishment.”¹³⁴ Brown notes that when federal prosecutors believe that a corporation has committed a crime, they may decline prosecution upon consideration of “collateral consequences, including disproportionate consequences to shareholders and employees not proven personally culpable.”¹³⁵ A recent decision by the Supreme Court of Canada applied similar analysis to punishment of native people in Canada.¹³⁶

Hip-hop culture suggests broad support for such an approach in the United States, especially as applied to minority communities. In practice, consideration of collateral consequences might lead to sanctions other than incarceration. When prison is appropriate, sentences might be shorter, or family leave could be allowed. Prisoners might be allowed to work to support their families. The

130. Roberts, *supra* note 128.

131. Makaveli, *White Man’s World, on THE DON KILLUMINATI: THE 7 DAY THEORY* (Interscope Records 1996) (lyrics available at Original Hip-Hop (Rap) Lyrics Archive, at http://ohhla.com/anonymous/2_pac/don_kill/whiteman.2pc.txt (last visited Mar. 5, 2004)). For a discussion of the impact of mass incarceration on social norms, see *supra* Part III.

132. See Darryl K. Brown, *Third-Party Interests in Criminal Law*, 80 TEX. L. REV. 1383, 1383 (2002) (discussing ways in which “the practice of criminal law . . . accommodates concerns for collateral consequences to third parties”).

133. Kant wrote:

Juridical Punishment can never be administered merely as a means of promoting another Good either with regard to the Criminal himself or to Civil Society, but must in all cases be imposed only because the individual on whom it is inflicted *has committed a Crime*. For one man ought never to be dealt with merely as a means subservient to the purpose of another . . .

KANT, *supra* note 114, at 195 (emphasis in original).

134. Brown, *supra* note 132, at 1384.

135. *Id.* at 1387 (quoting Memorandum from Eric H. Holder, Jr., Assistant Attorney General, to all U.S. Attorneys and Heads of Department Components pt. II (June 16, 1999)).

136. See R. v. Gladue, [1999] S.C.R. 688 (Can.)

goal would be sentencing targeted not just to the individual offender, but to his entire community.

In practice, a hip-hop construct of punishment would combine retributive and utilitarian justifications but differently than the prevailing mixed-theory model, which assumes that the aim of punishment is utilitarian, but with retributive limits.¹³⁷ In the hip-hop construct, the objective of punishment would be retribution—but with utilitarian limits.

B. *What to Punish?*

Ain't no Uzi's made in Harlem."

—Immortal Technique¹³⁸

1. *Who's bad?*

Consider the following facts: In the United States, approximately half of the people in prison are African American.¹³⁹ A black male born in 1991 has a 29% chance of being imprisoned, compared to a 16% chance for a Hispanic male, and a 4% chance for a white male.¹⁴⁰

If punishment is being allocated properly, these statistics suggest that half of the most dangerous or immoral Americans are black, even though African Americans make up only about 12% of the population. It means that black men pose such a threat that they must be locked up at a rate more than seven times that of white men, and that Hispanic men must be locked up at four times the rate. The person who has confidence in the American criminal justice system probably has an unfavorable view of blacks and Latinos and a more positive view of whites.

The hip-hop nation rejects this view. It does not see morality or dangerousness as allocated along the race and class lines that the prison population suggests. A frequent theme in hip-hop is that the law does not

137. Many scholars justify a mixed theory of criminal punishment. They distinguish between, on the one hand, the general justifying aim of the criminal law and, on the other hand, the rules of criminal responsibility that determine who should be punished and how severe the punishment should be. Many have argued that general aim of the criminal law . . . is to deter unwanted behavior. Nonetheless, some of these same utilitarians apply retributive concepts of just deserts in determining *whether* and *how much* to punish a particular person

DRESSLER, *supra* note 124, at 22-23 (emphasis in original).

138. Immortal Technique, *Peruvian Cocaine, on REVOLUTIONARY VOLUME 2* (Nature Sounds Records 2003) (lyrics available at Original Hip-Hop (Rap) Lyrics Archive, at http://www.ohhla.com/anonymous/immortal/rev_vol2/peruvian.tch.txt (last visited Mar. 5, 2004)). Immortal Technique quotes this line from the movie NEW JACK CITY (Warner Bros. 1991).

139. See MAUER, *supra* note 12, at 124.

140. See *id.* (citing BONCZAR & BECK, *supra* note 12).

correctly select the most deserving candidates for punishment. Specifically the law does not properly weigh the immorality posed and danger caused by white elites. On the other hand, it exaggerates the threat posed by the poor and by minorities. From this perspective, blameworthy conduct by privileged white people or the government often goes unpunished.

Thus Ice-T jokes that “America was stole from the Indians/ Show and prove, what was that?/ A straight up nigga move.”¹⁴¹ Immortal Technique complains that “families bleed because of corporate greed.”¹⁴²

Hip-hop artists sometimes accuse the state of complicity in crime. In “*Gun Music*,” Talib Kweli raps, “You know who killing it, niggas saying they militant/ The only blood in the street is when the government spilling it.”¹⁴³ In another song, Kweli provides an example: “[The police] be gettin’ tips from snitches and rival crews/ Doin them favors so they workin for the drug dealers too/ Just business enforcers with hate in they holsters/ Shoot you in the back, won’t face you like a soldier.”¹⁴⁴

Of course, complaints that criminal law is selectively enforced against blacks and other minorities are familiar, and not only in hip-hop culture. Hip-hop’s indictment of criminal justice goes further; it identifies bias in the way that crime is constructed as well as the way that it is enforced.

Some hip-hop artists have suggested that lawmakers define crime in a way that does not challenge powerful corporate interests—even when corporations cause harm. KRS, in “*Illegal Business*,” explains: “In society you have illegal and legal/ We need both, to make things equal/ So legal is tobacco, illegal is speed/ Legal is aspirin, illegal is weed.”¹⁴⁵ It is legal for a corporation to make a gun. Business people responsible for the sale of defective products are not typically prosecuted—even if the products cause death or severe injuries. Nicotine and alcohol distributors are licensed by the government; in the case of tobacco there are even government subsidies for growers. Sellers of other drugs, including arguably less harmful ones, are punished. Hip-hop suggests that some of the existing distinctions between legal and illegal conduct, and

141. Ice-T, *Straight Up Nigga*, on O.G. ORIGINAL GANGSTER (Warner Brothers Records 1991) (lyrics available at Original Hip-Hop (Rap) Lyrics Archive, at http://www.ohhla.com/anonymous/ice_t/og/straight.ict.txt (last visited Mar. 5, 2004)).

142. Immortal Technique, *Speak Your Mind*, on REVOLUTIONARY VOLUME 1 (Viper Records 2001) (lyrics available at Original Hip-Hop (Rap) Lyrics Archive, at http://www.ohhla.com/anonymous/immortal/rev_voll/speak_yr.tch.txt (last visited Mar. 5, 2004)).

143. Talib Kweli featuring Cocoa Brovaz, *Gun Music*, on QUALITY (MCA Records 2002) (lyrics available at Original Hip-Hop (Rap) Lyrics Archive, at http://www.ohhla.com/anonymous/t_kweli/quality/gunmusic.tab.txt (last visited Mar. 5, 2004)).

144. Talib Kweli, *The Proud*, on QUALITY, *supra* note 143 (lyrics available at Original Hip-Hop (Rap) Lyrics Archive, at http://www.ohhla.com/anonymous/t_kweli/quality/theproud.tab.txt (last visited Mar. 5, 2004)).

145. Boogie Down Productions, *Illegal Business*, on BY ALL MEANS NECESSARY (Jive Records 1988) (lyrics available at Original Hip-Hop (Rap) Lyrics Archive, at http://www.ohhla.com/anonymous/boogiedp/by_all/business.bdp.txt (last visited Mar. 4, 2004)).

between crimes and torts, are unprincipled.

Hip-hop sometimes presents poor minorities as relatively powerless in the grand scheme. "Right or wrong . . . I don't make the law," Erykah Badu explains to her criminal-minded lover in "*Danger*."¹⁴⁶ In this view, actual bad actors—including people who profit from widespread alcoholism, tobacco sales, and the demand for guns—are politically powerful. The fact that their injurious conduct is not punished helps explain hip-hop's lack of confidence in American criminal justice.

2. Hip-hop and drugs: Keeping it real.

In hip-hop culture, the idea that minorities are selectively prosecuted sometimes seems to border on paranoia. In the case of drug offenses, however, this perception is accurate. According to statistics compiled by the U.S. government, blacks are about 15% of monthly drug users.¹⁴⁷ Yet, they accounted for 33% of drug possession arrests¹⁴⁸ and more than 70% of people incarcerated for drug use.¹⁴⁹ Just because you are paranoid, the old joke goes, doesn't mean they're not out to get you.

The fact that drug offenses are selectively prosecuted in the African American community informs the hip-hop perspective on drug criminalization, but it is only one factor among many. A persistent critique of hip-hop culture is that it glorifies the use of illegal drugs. Upon closer examination, we see that this is partly true.

Hip-hop culture suggests that recreational drugs like marijuana and ecstacy enhance the quality of life and that they are fun.¹⁵⁰ The Notorious B.I.G. raps: "Some say the x, make the sex/ Spec-tacular."¹⁵¹ Hip-hop stars Ja Rule, Missy Elliott, and Tweet collaborated on a song called "X" which extols the virtues of having sex under the influence of ecstacy.¹⁵²

Marijuana, though, is the hip-hop nation's intoxicant of choice. In a classic song, Snoop Dogg raps about the pleasure of driving through his neighborhood

146. Erykah Badu, *Danger*, on WORLDWIDE UNDERGROUND (Motown Records 2003) (lyrics available at Erykah Badu Lyrics—Danger, at <http://www.azlyrics.com/lyrics/erykahbadu/danger.html> (last visited Mar. 5, 2004)).

147. See MAUER, *supra* note 12, at 147.

148. See *id.* at 146.

149. See Thomas, *supra* note 83.

150. For an insightful analysis of hip-hop's treatment of marijuana and crack cocaine, see Ted Sampson-Jones, *Culture and Contempt: The Limitations of Expressive Criminal Law*, 27 SEATTLE U. L. REV. 133, 163-67 (2003).

151. Notorious B.I.G. featuring R. Kelly, *Fuck You Tonight*, on LIFE AFTER DEATH, *supra* note 108 (lyrics available at Original Hip-Hop (Rap) Lyrics Archive, at http://ohhla.com/anonymous/ntr_big/l_aftr_d/fuck_you.big.txt (last visited Mar. 7, 2004)).

152. Ja Rule featuring Missy Elliot & Tweet, *X*, on PAIN IS LOVE (Sony Records 2001) (lyrics available at Original Hip-Hop (Rap) Lyrics Archive, at http://ohhla.com/anonymous/ja_rule/painlove/x.jah.txt (last visited Mar. 7, 2004)).

sipping alcohol and smoking weed.¹⁵³ The scholar Michael Eric Dyson describes marijuana as “the necessary adjunct to ghetto fabulousness Getting high is at once pleasurable and political: It heightens the joys to be found in thug life while blowing smoke rings around the constraints of the state.”¹⁵⁴

Indeed there are probably more hip-hop songs critical of the harm posed by alcohol than by other soft drugs. Public Enemy, for example, compared the large cans of malt liquor sold in low-income communities to a “gun to the brain.”¹⁵⁵

Hip-hop offers a more nuanced, and less consistent, perspective on “hard” drugs. Some critics have observed that more respect is accorded sellers than users. 2Pac (a.k.a. Tupac Shakur), for example, criticizes his addict parent for being a “part time mutha.”¹⁵⁶ In another song, however, he praises street corner dealers for raising him when his father was not present.¹⁵⁷

Other hip-hop artists are angrier at drug sellers. Ice Cube raps, “And all y’all dope-dealers . . . You’re as bad as the po-lice—cause ya kill us.”¹⁵⁸ He goes on to castigate dealers for “[e]xploitin’ us like the Caucasians did/ For 400 years—I got 400 tears—for 400 peers/ Died last year from gang-related crimes.”¹⁵⁹

Still, there is sympathy for why some people sell drugs. Biggie Small facetiously dedicated his autobiographical song “Juicy” to the people who called the police when he was “just tryin’ to make some money to feed [his] daughters.”¹⁶⁰ Kanye West raps about being “forced to sell crack” because there “ain’t no tuition for having no ambition/ and ain’t no loans for sittin’ your

153. Snoop Dogg, *Gin and Juice*, on DOGGYSTYLE (Death Row Records 1993) (lyrics available at Original Hip-Hop (Rap) Lyrics Archive, at <http://ohhla.com/anonymous/snoopdog/dogstyle/ginjuice.snp.txt> (last visited Mar. 5, 2004)).

154. MICHAEL ERIC DYSON, HOLLER IF YOU HEAR ME: SEARCHING FOR TUPAC SHAKUR 239 (2001).

155. Public Enemy, *1 Million Bottlebags*, on APOCALYPSE 91 . . . THE ENEMY STRIKES BACK (Def Jam Records 1991) (lyrics available at Original Hip-Hop (Rap) Lyrics Archive, at http://ohhla.com/anonymous/pb_enemy/apoc_91/1mil_bag.pbe.txt (last visited Mar. 5, 2004)).

156. 2Pac, *Part Time Mutha*, on 2PACALYSPE NOW (Jive Records 1992) ((lyrics available at Original Hip-Hop (Rap) Lyrics Archive, at http://www.ohhla.com/anonymous/2_pac/2pclypse/parttime.2pc.txt (last visited Mar. 5, 2004))).

157. 2Pac, *Dear Mama*, on ME AGAINST THE WORD (Jive Records 1995), (lyrics available at Original Hip-Hop (Rap) Lyrics Archive, at http://www.ohhla.com/anonymous/2_pac/matworld/dearmama.2pc.txt (last visited Mar. 5, 2004)).

158. Ice Cube, *Us*, on DEATH CERTIFICATE (Priority Records 1991) (lyrics available at Original Hip-Hop (Rap) Lyrics Archive, at http://ohhla.com/anonymous/ice_cube/death/us.cub.txt (last visited Mar. 5, 2004))).

159. *Id.*

160. Notorious B.I.G., *Juicy*, on LIFE AFTER DEATH, *supra* note 108 (lyrics available at Original Hip-Hop (Rap) Lyrics Archive, at http://www.ohhla.com/anonymous/ntr_big/ready_to/juicy_big.txt (last visited Mar. 5, 2004))).

ass at home.”¹⁶¹

Ultimately hip-hop acknowledges the poor consequences that drugs can have on individuals and communities. The culture is not as quick as some scholars to label drug crimes “victimless.” Acknowledging these costs, however, does not inevitably lead to a belief that drug offenders should be punished. Because of the environmental factors that contribute to drug use and sales, the government’s perceived complicity in the availability of drugs in the ghetto, the fact that the state allows the sale of potentially harmful drugs like tobacco and alcohol, and the selective enforcement of the drug laws in minority communities, the hip-hop consensus seems to be against punishment of drug offenders.¹⁶² In this view, the state may have a legitimate interest in controlling the use and sale of some drugs. First, however, the government bears the burden of proving that it can regulate drugs in a manner free of racial bias and that the benefits of regulation will not be outweighed by the costs.¹⁶³

C. How to Punish?

1. Punishment from inside.

Freedom and power to determine our destiny. . .
Black juries when our brothers are tried in court
—Paris¹⁶⁴

Hip-hop artists frequently express suspicion of discretion exercised by people outside their community, especially white elites. This concern is conveyed most often in critiques of the police. In “99 Problems,” Jay-Z wonders if he is stopped by the police because he is young, black, and wearing his hat low on his head.¹⁶⁵ Grand Puba recalls driving on the New Jersey turnpike:

[When a police officer] looked over, caught the shine from the rim of the

161. Kanye West, *We Don’t Care*, on COLLEGE DROPOUT (Roc-A-Fella Records 2004) (lyrics available at Kanye West Lyrics—We Don’t Care, at <http://www.azlyrics.com/lyrics/kanyewest/wedontcare.html> (last visited Mar. 5, 2003)).

162. See Sampsell-Jones, *supra* note 150.

163. This is an example of hip-hop’s mixed theory of punishment at work. The culture’s retributive instinct argues for punishment of drug offenders who harm others, for instance, cocaine sellers. The utilitarian limitations on punishment, however, including the number of minority men who would be incarcerated under an exclusively harm-based regime, militates against punishment.

164. Paris, *Escape from Babylon*, on THE DEVIL MADE ME DO IT (Tommy Boy Records 1990) (lyrics available at Original Hip-Hop (Rap) Lyrics Archive, at <http://ohhla.com/anonymous/paris/thedevil/escape.prs.txt> (last visited Mar. 5, 2004)).

165. Jay-Z, *99 Problems*, on THE BLACK ALBUM (Def Jam Records 2003) (lyrics available at Original Hip-Hop (Rap) Lyrics Archive, at http://ohhla.com/anonymous/jigga/theblack/99_probs.jyz.txt (last visited Mar. 5, 2004)).

Rover/ You know his next move (sound of police siren) pull it over . . . I pulls over to the right hand shoulder/Look through the rearview he got his hand on his holster/ He had this look “how this black nigga this car?”/ You know these cracker state troopers don’t know rap stars.¹⁶⁶

Many artists also worry about discretion by sentencing authorities. Big L raps that “There are too many young black brothers doin life bids/ Cause justice means ‘just us white kids.’”¹⁶⁷ This concern is supported by empirical evidence that blacks and Hispanics receive more severe sentences than whites for the same crime.¹⁶⁸

Efforts by lawmakers to constrain discretion, however, seem to have exacerbated inequities. The Federal Sentencing Guidelines are one example. Professor Charles Ogletree writes,

[The United States Sentencing Commission’s failure] to consider the offender’s personal characteristics places too great an emphasis on the harm caused by the offender’s act and too little emphasis on circumstances that would serve to mitigate the punishment. The Commission should have realized that it is a *person* who stands before the bar to accept the punishment imposed by the court.¹⁶⁹

Mos Def echoes Professor Ogletree’s concern about wholesale justice: “Yo, it’s one universal law but two sides to every story/ Three strikes and you be in for life, mandatory/ And even if you get out of prison still livin/ Join the other five million under state supervision/ This is business, no faces just lines and statistics.”¹⁷⁰

One response, from a hip-hop ethos, might be a requirement that punishment be imposed by people within the community. In the context of trials, Professor Sheri Lynn Johnson has observed “the most obvious counterbalance to the bias of white jurors is the mandatory inclusion of black jurors in the decisionmaking process.”¹⁷¹ Professor Johnson’s recommendation could be extended to sentencing. Thus, a defendant would have the right to

^{166.} Brand Nubian, *Probable Cause*, on FOUNDATION (Arista Records 1998) (lyrics available at Original Hip-Hop (Rap) Lyrics Archive, at <http://ohhla.com/anonymous/brnubian/found/probable.brn.txt> (last visited Mar. 7, 2004)).

^{167.} Big L, *Fed Up wit the Bullshit*, on LIFESTYLEZ OV DA POOR AND DANGEROUS (Sony Records 1995) (lyrics available at Original Hip-Hop (Rap) Lyrics Archive, at http://www.ohhla.com/anonymous/big_l/lifestyl/fedupwit.bgl.txt (last visited Mar. 5, 2004)).

^{168.} See MAUER, *supra* note 12, at 138-40.

^{169.} Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1953 (1988); see also Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 937 (1991) (“Aggregated sentences, whether chosen by a legislature or by a sentencing commission, seem likely to be more severe than individualized sentences.”).

^{170.} Mos Def, *Mathematics*, on BLACK ON BOTH SIDES (Rawkus Records 1999) (lyrics available at Original Hip-Hop (Rap) Lyrics Archive, at http://ohhla.com/anonymous/mos_def/black_on/math.mos.txt (last visited Mar. 7, 2004)).

^{171.} Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1649 (1985).

jurors from his community, and these jurors would have sentencing authority.¹⁷²

Advocacy of this kind of reform has been a consistent theme in hip-hop. In “*Escape from Babylon*,” Paris outlined a ten-point plan that included black juries for African American defendants.¹⁷³ Similarly, Nas has recommended that “the streets be the court—and corners hold the trial.”¹⁷⁴

“Representation” is an important theme in hip-hop culture. One “represents” by conducting himself or herself in a way that makes the community proud. Representation implies responsibility. In sentencing law-breakers, representation of the hip-hop community would enhance the expressive value of punishment and give it a legitimacy it now lacks.

2. Prison.

I hold this slow and daily tampering with the mysteries of the brain, to be immeasurably worse than any torture of the body.

—Charles Dickens¹⁷⁵

Prison is an instrument of punishment that is approximately 200 years old. It was designed in an attempt to punish criminals in a more humane way than killing them or harming their bodies.¹⁷⁶ How successful has the experiment been?

The hip-hop nation is better situated to answer the question than virtually any other community in the world. The United States incarcerates more people than any country other than Russia.¹⁷⁷ The majority of its inmates are African American and Hispanic.

Hip-hop became popular during the same period that the prison population experienced its greatest expansion. From 1972 to 1997, the prison population increased by 500%—from 196,000 to 1,159,000 inmates.¹⁷⁸ The rate of violent crime actually decreased during this time, but the number of people locked up for nonviolent offenses rose sharply.¹⁷⁹

The experiences of the two million people now incarcerated in the United

172. See Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951 (2003) (advocating juror sentencing).

173. Paris, *supra* note 164.

174. Nas, *Nas Is Coming, on IT WAS WRITTEN* (Sony Records 1996) (lyrics available at Original Hip-Hop (Rap) Lyrics Archive, at <http://ohhla.com/anonymous/nas/written/coming.nas.txt> (last visited Feb. 28, 2004)).

175. LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 80 (1993) (quoting CHARLES DICKENS, AMERICAN NOTES 146 (Penguin 1972) (1842)).

176. For a concise history of prison, see MAUER, *supra* note 12, at 1-14. For a deeper analysis, see FOUCAULT, *supra* note 88.

177. See MAUER, *supra* note 12, at 23 figs.2-3.

178. See *id.* at 19.

179. See *id.* at 19-37.

States have been documented more in hip-hop than in any other medium. The portrait is ugly. To Nas, prison is “the belly of the beast” and “the beast love to eat black meat/ And got us niggaz from the hood, hangin’ off his teeth.”¹⁸⁰

The virtually universal view in the hip-hop nation is that punishing people by locking them in cages for years is a miserable public policy. Incarceration is cruel because it is dehumanizing. It is counterproductive because, as discussed in Part III, it has been used so promiscuously in minority communities that it has lost its value as deterrence. The scholar Robin Kelley summarizes the hip-hop perspective as follows: “Prisons are not designed to discipline but to corral bodies labeled menaces to society; policing is not designed to stop or reduce crime in inner-city communities but to manage it.”¹⁸¹

The artists put it more eloquently: In the words of Beanie Sigel “I know what it’s like in hell/ I did a stretch in a triflin’ cell. . . . [L]ocked down all day, underground, neva seein’ the sun/ Vision stripped from you, neva seein’ your son.”¹⁸² Immortal Technique says “sleeping on the floor in cages starts to fuck with your brain/ The system ain’t reformatory, it’s only purgatory.”¹⁸³ DMX describes “the frustration, rage, trapped inside a cage.”¹⁸⁴

Hip-hop often depicts incarceration as being driven by profit rather than public safety. Its analysis is that it is socially expedient to warehouse people whose problems are difficult or expensive to treat, especially when there are economic benefits to the (largely white and rural) communities where prisons frequently are situated. This concern is supported in part by the rise in the prison population during an era in which violent crime decreased. The hip-hop perspective is reminiscent of Kant’s critique of utilitarianism—that it is immoral to punish people as a means of benefiting society. According to some artists, that is the real meaning of the punishment regime. GangStarr complains: “The educational system presumes you fail/ The next place is the corner then after that jail.”¹⁸⁵ Mos Def suggests a “prison-industry complex” that supports a “global jail economy.”¹⁸⁶ Ras Kass explains: “It’s almost methodical,

180. DMX, Method Man, Nas & Ja Rule, *Grand Finale*, on BELLY SOUNDTRACK (Def Jam Records 1998) (lyrics available at Original Hip-Hop (Rap) Lyrics Archive, at <http://ohhla.com/anonymous/misc/hip-hop/grfinale.bly.txt> (last visited Mar. 4, 2004)).

181. Kelley, *supra* note 92, at 118.

182. Beanie Sigel, *supra* note 4.

183. Immortal Technique, *Revolutionary*, on REVOLUTIONARY VOLUME 1, *supra* note 142 (lyrics available at Original Hip-Hop (Rap) Lyrics Archive, at http://ohhla.com/anonymous/immortal/rev_vol1/revolut.tch.txt (last viewed Feb. 28, 2004)).

184. DMX, *Who We Be*, on THE GREAT DEPRESSION (Universal Records 2001) (<http://www.ohhla.com/anonymous/dmx/thegreat/whoweb.e.dmx.txt> (last visited Mar. 5, 2004)).

185. GangStarr, *Conspiracy*, on DAILY OPERATION (Chrysalis/ERI 1992) (lyrics available at Original Hip-Hop (Rap) Lyrics Archive, at http://www.ohhla.com/anonymous/gngstarr/daily_op/conspire.gsr.txt (last visited Mar. 28, 2004)).

186. Mos Def, *supra* note 170.

education is false assimilation/ Building prisons is more economical."¹⁸⁷

CONCLUSION: WORD IS BORN

Hip-hop culture ascended to national prominence in the post-civil rights era. For the hip-hop nation, one of the enduring lessons of the civil rights movement is that the criminal law was used as an instrument of racial subordination. Images of civil rights activists getting locked up (or brutalized by the police) are common in hip-hop culture, especially music videos.

Hip-hop artists express some of the same concerns as traditional civil rights activists about criminal justice. Both vigorously protest racial profiling by police. Unlike civil rights culture, hip-hop does not practice a politics of respectability. It is less bourgeois. It champions the human rights of criminals as enthusiastically as the rights of the falsely accused. It is as concerned with fairness for drug sellers as for law-abiding middle-class people who are stopped by the police for "driving while black" or "driving while brown." Ultimately, hip-hop culture's reforms focus more on substantive than procedural issues (criminal law more than criminal procedure). Accordingly hip-hop activists may be better equipped to protest the crack cocaine sentencing regime, felony disenfranchisement, or recidivist statutes than organizations like the NAACP. They are also more willing to use nontraditional tactics to change the laws.

At the same time, hip-hop culture is post-postmodern. Some hip-hop artists seem more optimistic about the potential of the United States to achieve justice than some critical theorists. There is more faith in the potential of the rule of law, even if that potential is not now realized. Some hip-hop artists are less suspicious of capitalism than are many postmodernists. Hip-hop ultimately, however, seems more rooted in critical theory than traditional jurisprudence. It embraces instrumentalist tactics and is deeply suspicious of authority.

One serious deficiency in hip-hop is its endemic sexism and homophobia. Can any credible theory of justice be based on a culture that routinely denigrates more than half the population? The answer must be "no." In order for hip-hop to command the moral authority that, at its best, it deserves, it must address subordination within the hip-hop nation. The problem besmirches hip-hop's extraordinary aesthetic achievement and detracts from its important evaluation of criminal justice. Hip-hop music and videos, especially, contain the kind of depictions of gender and sexuality that we might expect of adolescent boys.

The increasing prominence of women rappers provides limited cause for hope.¹⁸⁸ Hip-hop has a long way to go, however, before its constructive

187. Ras Kass, *Ordo Abchao (Order Out of Chaos)*, on SOUL ON ICE (Priority Records 1996) (lyrics available at Original Hip-Hop (Rap) Lyrics Archive, at http://ohhla.com/anonymous/ras_kass/sl_onice/abchao.rsk.txt (last visited Mar. 5, 2004)).

188. For an analysis of black women rappers and sexual politics in rap music, see

political analysis is not compromised by lyrics, visual images, and attitudes that put down a considerable portion of its own community.

This Article is a beginning. It is an early attempt to fashion a hip-hop jurisprudence. In hip-hop culture there is a tradition of answer raps—of provocative responses to provocative words. I look forward to those responses.